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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/723,575	11/26/2003	David Watzke	09815180-0006	9112

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EXAMINER

ELOSHWAY, NIKI MARINA

ART UNIT	PAPER NUMBER
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3781

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	12/26/2006	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

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Office Action Summary	Application No. 10/723,575	Applicant(s) WATZKE ET AL.	
	Examiner Niki M. Eloshway	Art Unit 3781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 October 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9, 14-19, 21 and 24-42 is/are pending in the application.
- 4a) Of the above claim(s) 1-9, 14-19 and 21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 24-42 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 19 October 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>7/31/06</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Election/Restrictions

1. Claims 1-9, 14-19 and 21 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the telephone interview held on September 24, 2005.

Terminal Disclaimer

2. The terminal disclaimer filed on October 19, 2006 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Application No. 10/412,008 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 24, 25, 36 and 37 are rejected under 35 U.S.C. 102(b) as being anticipated by Yang (U.S. 6,378,325). Yang teaches a container having a removable lid 3, and a container body 1, 2. The container body has an open top, shown in figure 1, an upper chamber holding salad 6 and a lower chamber at lead line 5, the selective barrier is element 2.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 26-29, 31-34 and 38-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yang (U.S. 6,378,325) in view of Florian (U.S. 3,989,158). Regarding claims 10-13 and 20, Yang does not teach the upwardly angled extension of the barrier. Florian as seen in Fig. 6 teaches the upwardly angled extension at 32 for wedging with the outer container. It would have been obvious to make the barrier of Yang conform the shape of the outer container as taught by Florian to make insure that the extension remains properly seated in the outer container and is not accidentally displaced by the contents on top of the barrier.

7. Claims 30, 35 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yang (U.S. 6,378,325) in view of Florian (U.S. 3,989,158), as applied to claims 26, 31 and 38 above, and further in view of Ferguson (U.S. 6,153,237). The primary reference of Yang does not specifically state that the lid forms a liquid tight seal. Ferguson teaches that it is known to provide a compartmented container with a lid which forms a liquid tight seal (see col. 5 lines 21-27). It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the modified device of Yang with the lid forming a liquid tight seal, as taught by Ferguson, in order to keep the contents of the device fresh.

Response to Amendment

8. The drawings were received on October 19, 2006. These drawings are acceptable.

Response to Arguments

9. Applicant's arguments filed October 19, 2006 have been fully considered but they are not persuasive. Applicant argues that “[n]either Yang nor Florian, alone or in combination, teach or suggest a container where the relatively large food items are stored away from small food ingredients until just before consumption”. The examiner disagrees with this position. The claims are drawn to a salad container and the limitation that large food items are stored away from small food ingredients until just before consumption is a recitation of intended use. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. A claim containing a “recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus” if the prior art apparatus teaches all the structural limitations of the claim. *Ex parte Masham*, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987) The prior art containers of Yang and Florian are capable of performing the function of keeping large food items stored away from small food ingredients until just before consumption. Small food ingredients are allowed to pass through the barrier of Yang provided that they are smaller than the aperture size. Once the food ingredients are received into the lower chamber they may pass back into the upper chamber when the container is inverted. There is no structural difference between the present invention and the container of Yang which would prevent the container of Yang from performing the function set forth in the claims.

10. While features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function, because apparatus claims cover what a device is, not what a device does (*Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990)). Thus, if a prior art structure is

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capable of performing the intended use as recited in the preamble, or elsewhere in a claim, then it meets the claim. For these reasons, the rejections are considered proper and have been sustained above.

Conclusion

11. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

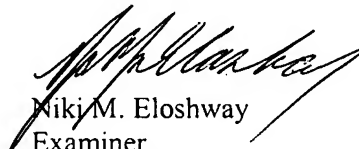
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Niki M. Eloshway whose telephone number is 571-272-4538. The examiner can normally be reached on Thursdays and Fridays 8 a.m. to 4 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anthony Stashick can be reached on 571-272-4561. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.


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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Niki M. Eloshway
Examiner
Art Unit 3781

nme



ANTHONY D. STASHICK
PRIMARY EXAMINER